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Supreme Court, U.S.
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No. 03-1627

IN THE

Supreme Court of the United States

MICHAEL T. HOWELL AND CHERI A. HOWELL,
Petitioners,

v.

HUGH RICCI, P.E., STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, AND PACIFIC RECLAMATION WATER COMPANY, A NEVADA CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent, Hugh Ricci, P.E., Nevada State Engineer, Division of Water Resources, Department of Conservation and Natural Resources (State Engineer), disagrees with the questions presented by Petitioners, Michael T. Howell and Cheri A. Howell (Howells). The State Engineer believes the only question before this Court is whether the Nevada Supreme Court's Order of Affirmance was based on independent and adequate State grounds that preclude the Howells' requested relief.

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STATEMENT OF THE CASE

I. INTRODUCTION

The Nevada State Engineer is appointed by and is responsible to the Director of the Nevada Department of Conservation and Natural Resources and performs duties prescribed by law and by the Director of the Department. NEV. REV. STAT. 532.090, 532.110 (2003). Those duties include administering the appropriation and management of Nevada's public water, both surface and groundwater, under NEV. REV. STAT. chapters 533 and 534.

This case involves a challenge to an administrative decision of the State Engineer made in 1944 to transfer water rights adjudicated under the Humboldt River Decree from land owned by the Howells' predecessors to land owned by Pacific Reclamation Water Company (Pacific Reclamation). The Howells purchased the land to which the water rights were previously appurtenant in 1997. The Howells now seek to reverse the State Engineer's 1944 decision.

In 1997 the Howells' immediate predecessors, the Hawks, submitted a report of conveyance with the State Engineer to vest title in the disputed rights in their name. The State Engineer refused to confirm the report of conveyance because his records showed the water rights were transferred to Pacific Reclamation in 1944. Nevada law prohibits the State Engineer from confirming a report of conveyance if a conflict exists in the chain of title. *See* NEV. REV. STAT. 533.386 (2003).

The Howells filed a Petition for Judicial Review of the State Engineer's decision to refuse to confirm the report of conveyance. The Howells alleged that the 1944 transfer to Pacific Reclamation was erroneous, and therefore, a conflict does not exist in the chain of title submitted by the Hawks. Pet. App. 86-96.

The Sixth Judicial District Court of Nevada found substantial evidence supporting the State Engineer's

determination that a conflict exists in the chain of title. The District Court also found that a challenge to the 1944 decision is procedurally barred pursuant to NEV. REV. STAT. 533.450. Pet. App. 13-29. The Nevada Supreme Court affirmed. Pet. App. 1-12.

II. BACKGROUND

The Humboldt River is located in northern Nevada and flows for over three hundred miles from the high mountains in and around Elko, Nevada, to the Humboldt sink near Lovelock, Nevada. The Humboldt River is the primary source of water for the agricultural and municipal communities that have developed along its banks.

The State Engineer initiated an adjudication procedure for the Humboldt River and its tributaries in 1913. *Ormsby County v. Kearney*, 142 P. 803, 813 (Nev. 1914). From that date forward, the State Engineer was responsible for distribution of the water rights that were defined in his Order of Determination. NEV. REV. STAT. 533.220(1) (2003). The Sixth Judicial District Court of Nevada entered its final decree for the adjudication of the Humboldt River and its tributaries in 1931 (the Bartlett Decree) and amended the decree in 1935 (the Edwards Decree). The State Engineer or the Water Commissioners have distributed the waters adjudicated in the decree as officers of, and under the supervision of, the Sixth Judicial District Court of Nevada ever since. NEV. REV. STAT. 533.220(1) (2003).

The dispute in this case involves claim 00608 of the Humboldt River adjudication that is found at page eighty-one (81) of the Edwards Decree. The claim was granted to the Metropolis Land Company, and part of the claim was granted for water from Bishop and Burnt Creek for 147.44 acres of land with an 1876 priority date. Pet. App. 88. It is the water right associated with this specific 147.44 acre parcel that is at issue here.

The State Engineer's records reflect that on June 14, 1944, Pacific Reclamation filed Change Applications 11125 and 11127 with the Office of the State Engineer to change

the place of use of the water right associated with the 147.44 acre parcel from the place of use identified in the Edwards Decree to a place of use within Pacific Reclamation's irrigation project. Pet. App. 45, 55.

The Applications were processed in accordance with the Nevada Compiled Laws of 1929, in effect at the time of this transaction. Pet. App. 38-44. Notice of the Applications was published for five weeks in the *Wells Progress*, a weekly newspaper published in Wells, Nevada. Pet. App. 65-68. There is no record that a protest to either Application was filed with the Office of the State Engineer. The State Engineer approved the Applications on September 12, 1944, and issued Certificates of Appropriation on February 16, 1945. Pet. App. 45, 55, 69, 75. There is no evidence in the record that any person filed a petition for judicial review.

The State Engineer's records reflect that on June 18, 1962, Alonzo Knudsen (a predecessor to the Howells), through his attorney, sent a letter to the State Engineer's Office inquiring about the validity of Permit 11125. Pet. App. 81. The State Engineer sent a letter in response on June 22, 1962, affirming the validity of both Permits 11125 and 11127. Pet. App. 83. In 1986 the State Engineer also sent letters to Royce Wood (another predecessor to the Howells) reaffirming the validity of Pacific Reclamation's Permits. Respondent Pacific Reclamation's Appendix 1-4.

In spite of the State Engineer's earlier determinations, the Hawks (the Howells' immediate predecessors) sought to have a report of conveyance confirmed by the State Engineer in their favor. The record reflects that on August 19, 1997, the Hawks wrote a letter to the State Engineer's Office stating that the water rights were erroneously transferred to Pacific Reclamation under Permits 11125 and 11127. And, on March 19, 1998, the Hawks filed a report of conveyance with the State Engineer seeking to transfer the water rights. Respondent Pacific Reclamation's Appendix 8-9. On February 11, 1999, the State Engineer issued a written decision denying the

Hawks' request and reaffirming the validity of Permits 11125 and 11127. Respondent Pacific Reclamation's Appendix 12-14.

On May 25, 1999, the Hawks sent another letter to the State Engineer challenging the decision to uphold Permits 11125 and 11127. Respondent Pacific Reclamation's Appendix 15-16. On June 15, 1999, an assistant with the State Engineer's Office sent a letter to the Hawks stating that the waters had been assigned to show the Hawks as the owners. Pet. App. 84. The letter stated that the decision was "subject to amendment upon receipt of additional information." Pet. App. 84. On July 19, 1999, the assistant sent another letter to the Hawks rescinding the June 15, 1999, letter and reaffirming the validity of Permits 11125 and 11127. Pet. App. 30-31.

III. JUDICIAL PROCEEDINGS

A. Proceedings before the Sixth Judicial District Court of Nevada.

On August 18, 1999, the Howells filed a Petition for Judicial Review from the July 19, 1999, letter of the State Engineer with the Sixth Judicial District Court of Nevada. Pet. App. 86-96. The Howells requested the Court enter an Order requiring the State Engineer nullify Permits 11125 and 11127 and complete the chain of title in the disputed water rights submitted by the Hawks.

The Howells' argument centered on the contention that the Hawks' superior chain of title to the real property provided legal grounds for moving the water right back to where it was prior to the approval of Applications 11125 and 11127.

Both the State Engineer and Pacific Reclamation filed briefs in opposition. The State Engineer argued that he was prohibited pursuant to NEV. REV. STAT. 533.386 from confirming the report of conveyance because Permits 11125 and 11127 presented a conflict in the Hawks' chain of title. In addition, the State Engineer and Pacific Reclamation

argued that, pursuant to NEV. REV. STAT. 533.450, the Howells were procedurally barred from challenging the State Engineer's 1944 decision to approve Applications 11125 and 11127.

The District Court heard oral argument and, on May 23, 2002, entered its Findings of Facts, Conclusions of Law and Judgment. The District Court affirmed the State Engineer's decision to reject the Hawks' report of conveyance and dismissed the Howells' petition for judicial review, with prejudice. Pet. App. 13-29. The District Court found substantial evidence supported the State Engineer's decision to reject the report of conveyance pursuant to NEV. REV. STAT. 533.386. Pet. App. 29. The District Court also found that the Howells were procedurally barred pursuant to NEV. REV. STAT. 533.450 from petitioning the District Court for judicial review of the State Engineer's 1944 decision to grant Applications 11125 and 11127. Pet. App. 29.

B. Proceedings before the Nevada Supreme Court.

On June 12, 2002, the Howells filed an appeal with the Nevada Supreme Court. The Howells requested the Nevada Supreme Court reverse the District Court's order and require the State Engineer to alter his records to reflect the Howells as the owners of claim 00608 of the Humboldt River Decree.

The Howells again argued that the Hawks' superior chain of title to the real property provided legal grounds for moving the disputed water rights back to their land. Also, the Howells argued, for the first time, that the State Engineer denied the Knudsens due process of law in the 1944 transaction.

Both Pacific Reclamation and the State Engineer filed briefs in opposition, arguing that NEV. REV. STAT. 533.386 prevented the State Engineer from confirming the report of conveyance and that the Howells' claims were barred pursuant to NEV. REV. STAT. 533.450.

The Nevada Supreme Court heard oral argument and on April 1, 2004, entered its Order of Affirmance, signed by all seven justices. Pet. App. 1-12. The Nevada Supreme Court concluded that substantial evidence supported the State Engineer's decision to deny the report of conveyance pursuant to NEV. REV. STAT. 533.386 and that the District Court correctly concluded that the Howells' petition was procedurally barred pursuant to NEV. REV. STAT. 533.450. Pet. App. 1-12.

At the conclusion of its opinion, the Nevada Supreme Court added the following footnote: "In light of our disposition of the other issues litigated in this appeal, we reject the Howells' claim that the original 1944 permits are void for lack of procedural due process." Pet. App. 11. Thus the Nevada Supreme Court found it unnecessary to resolve the Howells' procedural due process argument based upon its resolution of the state law claims.

REASONS FOR DENYING THE PETITION

I. INTRODUCTION

On June 1, 2004, the Howells filed their Petition for Writ of Certiorari to this Court. In their Petition the Howells continue to challenge the State Engineer's 1944 decision to issue Permits 11125 and 11127. The Howells allege the Knudsens were deprived of due process in the 1944 transaction, and the Nevada Supreme Court rejected their due process claims on the merits. The Howells' attempt to re-characterize this case as involving significant due process issues, however, is without merit. The Nevada Supreme Court relied on independent and adequate State grounds when it affirmed the trial court's decision to dismiss the Howells' Petition for Judicial Review.

Pursuant to SUP. CT. R. 10, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for *compelling reasons*." SUP. CT. R. 10 (emphasis added). Further, a principal purpose for which the United States Supreme Court uses certiorari jurisdiction is to resolve

conflicts among circuit Courts of Appeals and state courts concerning meaning of provisions of *federal law*. *Braxton v. United States*, 500 U.S. 344, 347 (1991).

In this case the Nevada Supreme Court ruled that the District Court properly upheld the State Engineer's decision to deny the Howells' report of conveyance pursuant to NEV. REV. STAT. 533.386. The Nevada Supreme Court also ruled that the Howells' challenge to the State Engineer's decision to grant Applications 11125 and 11127 is procedurally barred pursuant to NEV. REV. STAT. 533.450. Pursuant to these rulings, the Nevada Supreme Court determined it was unnecessary to resolve the Howells' due process contentions. Therefore, the Nevada Supreme Court did not decide or resolve a federal issue, and this Court should deny the Howells' request for certiorari review.

II. THE NEVADA SUPREME COURT DID NOT DECIDE OR RESOLVE A FEDERAL ISSUE

The Howells assert the United States Supreme Court has jurisdiction to hear this case under SUP. CT. R. 10(b) and allege that the Court "has decided an important federal question in a way that conflicts with long standing decisions of the Supreme Court of the United States." Petition for Writ of Certiorari at 6. The Howells base this statement, and thus the United States Supreme Court's jurisdiction, entirely on footnote 24 found at the end of the Order of Affirmance. The footnote states:

> In light of our disposition of the other issues litigated in this appeal, we reject the Howells' claim that the original 1944 permits are void for lack of procedural due process.

The Howells state that "[t]he Court apparently connects the due process issues in some way to the 'other issues' addressed in its Order, but the footnote offers no further explanation." Petition for Writ of Certiorari at 11.

The "other issues" addressed in the Order are the Court's resolution of the State law claims, namely, that the

State Engineer was prohibited by statute from confirming the report of conveyance and that the Howells' contentions regarding the 1944 transfer are procedurally barred. Thus the only logical interpretation of footnote 24 is that the Court found it unnecessary to consider the Howells' due process contentions in light of the resolution of the State claims. The Nevada Supreme Court never resolved or decided the Howells' due process claims, nor was it necessary for the Court to do so. Therefore, the Nevada Supreme Court did not decide a federal issue and this Court should not review this case under SUP. CT. R. 10(b).

III. THE STATE ENGINEER WAS PROHIBITED BY STATE LAW FROM CONFIRMING THE REPORT OF CONVEYANCE

The Nevada Supreme Court ruled that the State Engineer was prohibited from confirming the Hawks' report of conveyance because Permits 11125 and 11127 presented a conflict in the Hawks' chain of title. Pursuant to this ruling, it was not necessary for the Nevada Supreme Court to consider the Howells' due process claims. The existence of Permits 11125 and 11127 statutorily prohibited the State Engineer from confirming the Hawks' report of conveyance.

In 1995 the Nevada State Legislature enacted NEV. REV. STAT. 533.382—.387. Prior to the enactment of these statutes, the State Engineer was often placed in the unintended role of resolving title disputes affecting water rights. One result of the 1995 amendments was NEV. REV. STAT. 533.386, which provides:

> 1. The State Engineer shall confirm that the report of conveyance required by paragraph (a) of subsection 1 of NRS 533.384 includes all material required by that subsection and that:
>
> (a) The report is accompanied by the prescribed fee;

(b) *No conflict exists in the chain of title* that can be determined by the State Engineer from the conveyance documents *or from other information on file in the office of the State Engineer;* and

(c) The State Engineer is able to determine the rate of diversion and the amount of water conveyed in acre-feet or million gallons from the conveyance documents or from other information on file in the office of the State Engineer.

. . . .

3. *If the State Engineer determines that the report of conveyance is deficient, he shall reject* the report of conveyance and return it to the person who submitted it with:

(a) An explanation of the deficiency; and

(b) A notice stating that the State Engineer will not confirm a report of conveyance that has been rejected unless the report is resubmitted with the material required to cure the deficiency. The notice must also include a statement of the provisions of subsection 4.

4. The State Engineer shall not consider or treat the person to whom:

(a) An application or permit to appropriate any of the public waters;

(b) A certificate of appropriation;

(c) An adjudicated or unadjudicated water right; or

(d) An application or permit to change the place of diversion, manner of use or place of use of water,

> is conveyed as the owner or holder of the application, right, certificate or permit for the purposes of this chapter, including, without limitation, all advisements and other notices required of the State Engineer and the granting of permits to change the place of diversion, manner of use or place of use of water, until a report of the conveyance is confirmed pursuant to subsection 1. [Emphasis added.]

Significant here are sections 1 and 3 of NEV. REV. STAT. 533.386. Section 1 provides that the State Engineer shall confirm a report of conveyance *unless* a conflict exists in the chain of title that can be determined by the State Engineer. Section 3 provides that if a report of conveyance is deficient, the State Engineer *shall* reject the report of conveyance. As the District Court observed, "[t]he intent of this provision was to take the State Engineer out of the position of resolving title disputes." Pet. App. 23. Title disputes should be resolved in an appropriate action, such as an action to quiet title.

The District Court also pointed out that "if substantial evidence exists in the record to support the State Engineer's determination that [the Howells'] report of conveyance should be rejected because of a conflict in the chain of title, then the State Engineer's decision must be upheld." Pet. App. 19. Both the District Court and the Nevada Supreme Court agreed that substantial evidence supported the State Engineer's determination that a conflict exists in the chain of title, since the records of the State Engineer's Office indicate the water right the Howells sought to have confirmed was taken off their predecessors' land through Applications 11125 and 11127. Therefore, the District Court and the Nevada Supreme Court upheld the State Engineer's decision to refuse to confirm the Hawks' report of conveyance pursuant to NEV. REV. STAT. 533.386.

The State Engineer was statutorily obligated to reject the Hawks' report of conveyance. The Nevada Supreme Court did not resolve the Howells' due process contentions because they are irrelevant to the analysis under NEV. REV. STAT. 533.386.

IV. THE HOWELLS' CHALLENGE TO THE 1944 TRANSFER IS PROCEDURALLY BARRED BY STATE LAW.

The District Court and the Nevada Supreme Court also recognized that the Howells' challenge to the 1944 decision to grant Applications 11125 and 11127 is procedurally barred. Therefore, it was not necessary for the Nevada Supreme Court to resolve the Howells' claim that the Knudsens did not receive due process in the 1944 transaction.

NEV. REV. STAT. 533.450 establishes the procedure by which a person aggrieved by a decision or order of the State Engineer may obtain judicial review. A party must commence proceedings to review the decision or order within thirty days following its rendition. NEV. REV. STAT. 533.450 states, "[a]ny person feeling himself aggrieved" by an order or decision of the State Engineer has thirty days to appeal that decision.

In this case Alonzo Knudsen, through his attorney, sent a letter to the State Engineer's Office in 1962 inquiring about the validity of Permit 11125. Pet. App. 81. The State Engineer sent a letter in response affirming the validity of both Permits 11125 and 11127. In 1986 the State Engineer also sent a letter to Royce Wood (another predecessor to the Howells) reaffirming the validity of Permits 11125 and 11127.

In spite of these earlier determinations, the Hawks sought to have the State Engineer confirm a report of conveyance in their favor. On February 11, 1999, the State Engineer issued a written decision denying the Hawks' report of conveyance and reaffirming the validity of Permits 11125 and 11127.

On May 25, 1999, the Hawks sent a letter to the State Engineer challenging his decision to uphold Permits 11125 and 11127. On June 15, 1999, the State Engineer's Office sent a letter to the Hawks stating the waters had been assigned to show the Hawks as the owners. Pet. App. 84. The letter stated that the decision was "subject to amendment upon receipt of additional information." Pet. App. 84. On July 19, 1999, the State Engineer's Office sent another letter to the Hawks rescinding the June 15, 1999, letter and reaffirming the validity of Permits 11125 and 11127.

The Howells filed a Petition for Judicial Review from the State Engineer's July 19, 1999, letter wherein he refused to confirm the Hawks' report of conveyance. Pet. App. 86-96. The State Engineer and Pacific Reclamation, however, argued that the July 19, 1999, letter did not result in an appealable decision within the meaning of NEV. REV. STAT. 533.450. The Howells tried to circumvent NEV. REV. STAT. 533.450 by arguing that the July 19, 1999, letter was a new decision subject to judicial review.

The District Court and the Nevada Supreme Court both recognized that the July 19, 1999, letter was not a separate decision subject to judicial review, but was merely a reaffirmation of a much earlier decision and did not change the positions of the parties.

Therefore, the Howells' challenge to the 1944 transaction is barred. The Nevada Supreme Court did not resolve the Howells' due process contentions because they are irrelevant to the analysis under NEV. REV. STAT. 533.450.

CONCLUSION

The Nevada Supreme Court relied on independent and adequate state grounds when it affirmed the District Court's decision to dismiss the Howells' Petition for Judicial Review. The Nevada Supreme Court expressly ruled that NEV. REV. STAT. 533.386 and NEV. REV. STAT. 533.450 independently preclude the Howells' requested relief.

The Howells' attempt to re-characterize this case as one involving significant due process issues is without merit. The State Engineer was statutorily obligated to reject the Hawks' report of conveyance. Furthermore, the Howells' challenge to a decision made over fifty-five years ago is procedurally barred.

The Nevada Supreme Court did not resolve or decide the Howells' due process issues. This is not the type of case that warrants review by the United States Supreme Court. Accordingly, the State Engineer respectfully requests this Court to deny the Howells' Petition for Writ of Certiorari.

Respectfully submitted,

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